

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

TAMIKA M. RAMSEY,

Defendant-Appellant.

UNPUBLISHED

April 11, 2000

No. 210720

Recorder's Court

LC No. 97-501517

Before: Zahra, P.J., and Saad and Gage, JJ.

PER CURIAM.

Defendant appeals as of right from her bench trial conviction of negligent homicide, MCL 750.324; MSA 28.556, for which the court sentenced defendant to two years' probation. We affirm.

Defendant first contends that she received ineffective assistance of counsel. Because defendant did not request a new trial or an evidentiary hearing with respect to her allegations of ineffective assistance, our review of this issue is limited to the existing record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Effective assistance of counsel is presumed. To overcome this presumption, a defendant must establish that his counsel's performance was objectively unreasonable and that he was prejudiced by counsel's defective performance. *People v Mitchell*, 454 Mich 145, 156, 164; 560 NW2d 600 (1997).

In this case, the available trial court record amply demonstrates that defense counsel's actions qualify as unreasonable under prevailing professional standards. The record reveals that on the first day of trial defense counsel had not yet picked up from the Dearborn Police Department a discovery packet prepared for him, but instead assumed that the prosecutor should and would simply mail him these discovery materials. See *Kimmelman v Morrison*, 477 US 365, 369, 385-387; 106 S Ct 2574; 91 L Ed 2d 305 (1986) (Defense counsel's performance was unreasonable where counsel failed to conduct any discovery regarding the state's case, insisting that it was the prosecutor's duty to provide the discovery material even though defense counsel had not requested it.).

Defense counsel's opening statement theorized that a defective guardrail was the reason for the victim's death, but counsel failed to file any witness list and, thus, did not list a road commission

representative on his witness list. Although the trial court allowed defense counsel to present this witness, the witness did not support counsel's theory. Counsel also suggested that the traffic light located at the intersection where the accident occurred was malfunctioning, but again presented no witnesses to that effect because he had none listed on a witness list and did not in advance of trial subpoena anyone from the "lighting commission." On the third day of trial, defense counsel then suggested that the victim died of a heart attack and not a broken neck as the autopsy report concluded, but was precluded from presenting any witnesses to this effect on the basis of his failure to list any on a witness list. The court ruled that any probative value of a proposed medical expert's testimony was substantially outweighed by the unfair prejudice to the prosecutor arising from the tardy addition of a defense witness on the third day of trial.

To establish that she received ineffective assistance of counsel, however, defendant must also show that she was prejudiced by this unreasonable performance. *Mitchell, supra*, at 164; *People v Pickens*, 446 Mich 298, 312; 521 NW2d 797 (1994). On the record before this Court, evidence of prejudice is lacking due to the strength of the prosecutor's case. With respect to the suggested defense that a defective guardrail caused the victim's death, we reiterate that the trial court did allow defense counsel to call a witness from the road commission who testified that the guardrail was not defective. Regarding defense counsel's suggestion that the intersection traffic light was malfunctioning at the time of the accident, an eyewitnesses to the accident and an investigating police officer who reported to the scene within minutes of the accident testified that the light was functioning properly. With regard to counsel's last theory that the victim died of a heart attack unrelated to the accident, the trial court's factual finding that defendant's collision with the victim's Lincoln, which the evidence showed sent the victim's vehicle out of control and caused it to fall top-down fourteen feet from the overpass onto the avenue below, represented a substantial cause of the victim's death rendered irrelevant the purported issue whether subsequent to the collision the victim ultimately died from a heart attack or a broken neck.

Accordingly, while we find that defense counsel's performance was unreasonable and did not meet prevailing professional standards, we conclude that defendant was not denied effective assistance of counsel because she suffered no prejudice arising from defense counsel's performance.¹ No reasonable probability exists that absent defense counsel's errors, the factfinder would have had a reasonable doubt respecting defendant's guilt. *Pickens, supra* at 312.

Defendant next argues that insufficient evidence supported her conviction of negligent homicide. In reviewing sufficiency of evidence claims, this Court must view the evidence in the light most favorable to the prosecution and determine whether any rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 722-723; 597 NW2d 73 (1999).

To be found guilty of negligent homicide, a defendant must have (1) operated a vehicle at an immoderate rate of speed or in a careless, reckless or negligent manner (2) that was a substantial cause of injuries resulting in another's death. MCL 750.324; MSA 28.556; *People v Lardie*, 452 Mich 231, 247-248, n 25; 551 NW2d 656 (1996). To convict a defendant of a criminal negligence offense, the prosecutor must prove beyond a reasonable doubt that the defendant's conduct was a factual cause of the fatal accident. In cases where the defendant's conduct was remote, the jury must decide whether

the defendant's conduct was the proximate or legal cause of the decedent's death. *People v Tims*, 449 Mich 83, 94-95; 534 NW2d 675 (1995).

The instant record reflects that defendant admitted driving a vehicle on March 26, 1997, that during a left turn she collided with the victim's Lincoln, and that she later saw the Lincoln travel off the overpass. At the time of the accident, defendant was driving with a suspended license. Despite defendant's suggestion that the Lincoln ran a red light, the testimony of two eyewitnesses, who were driving immediately behind the victim's Lincoln, indicated that the Lincoln proceeded through a green light. One eyewitness explained that it appeared that defendant in making her left turn was attempting to beat the traffic light. The investigating officer concluded that due to the impact with defendant's car, the victim's Lincoln lost traction on the roadway "then went out of control, went to the right lane, and then basically yawed across all lanes of traffic up and over the turnaround barrier and up onto the sidewalk, finally going through the guardrail and landing on its roof fourteen feet below." The medical examiner testified that the victim died almost instantaneously from neck injuries.

We conclude that viewing this evidence in the light most favorable to the prosecution a reasonable factfinder could have found the elements of negligent homicide. *Johnson, supra*; *Lardie, supra*.

Defendant maintains that insufficient evidence proved that her negligence was the cause of the victim's death and that the death was so remote that it would be unjust to permit her conviction to stand. Even accepting as defendant suggests, however, that the slight impact initiated by defendant was not the cause of the victim's death and that the possibility exists that the victim had a heart attack that caused him to lose control of his vehicle and travel over a defective guardrail, all these possibilities represent, at best, joint and equal causes of the victim's death. But for defendant's contact with the victim's Lincoln these other events would not have occurred and the Lincoln would not have gone over the rail. The Supreme Court has explained that a defendant's suggestion of an additional cause of death does not constitute a complete defense to negligent homicide, and that "joint equal causes do not excuse culpable behavior." *Tims, supra* at 96-97.

Accordingly, we reject defendant's contention that insufficient evidence supported the trial court's finding that defendant's conduct was a substantial factor in the victim's death. *Tims, supra* at 95.

Affirmed.

/s/ Brian K. Zahra
/s/ Henry William Saad
/s/ Hilda R. Gage

¹ To the extent that defendant argues on appeal that defense counsel failed to present a valid defense, we note that defense counsel called defendant to the stand and elicited her testimony that she had commenced her left turn only on the appearance of a green arrow signal, thus implying that the victim must have improperly proceeded through the light and caused the collision.